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No. 73-829

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MICHAEL RODAK, JR.,

In the Supreme Court of the United States

OCTOBER TERM, 1973

MIREE TOLBERT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the lawfulness of a search of his automobile and a search of his person at the time of his arrest.

Following a jury-waived trial on stipulated facts in the United States District Court for the Southern District of California, petitioner was convicted of possessing 625 pounds of marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of imprisonment for one year and one day. The court of appeals affirmed *per curiam* (Pet. App. B). A petition for rehearing was denied on October 4, 1973 (Pet. App. C). The petition for a writ of certiorari was not filed until November 23, 1973, and is therefore out

of time under Rule 22(2) of this Court's Rules.[1] There is, in any event, no reason for further review.

On September 24, 1972, petitioner engaged William Justus, a tow-truck operator, to tow a 1965 Chevrolet from Oceanside, California, north to San Clemente. Justus was to follow petitioner, who was driving a green 1972 Pinto. Petitioner, who retained the registration and keys to the towed vehicle, was aware that the trunk of the automobile contained 625 pounds of marihuana, which petitioner possessed with the intent to distribute.[2]

While towing the Chevrolet, Justus was stopped at a permanent United States Border Patrol checkpoint on Interstate Route 5 south of San Clemente, 67 miles from the Mexican border (Tr. 7). Justus was asked to open the trunk of petitioner's automobile but stated that he did not have the keys. The Border Patrol officer then pushed down on the automobile's trunk lid "to see if there was any give at all" (Tr. 8). He determined that "[i]t did not go down at all, it was solid" (*ibid.*).

The officer then "told Mr. Justus that the car could not go any further until we got a look into the trunk" (Tr. 9). Justus then entered the car, a convertible, and "ripped the canvas that led into the trunk area" (*ibid.*). He pulled from the trunk and handed to the officer a "yellow kilo-type package" that the officer recognized to contain marihuana (*ibid.*). The officer could see

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[1] The petition was initially received by the Clerk in early November but was not docketed at that time because of a failure to comply with Rule 39 of this Court's Rules.

[2] We are lodging with the Clerk of this Court copies of the stipulation of facts and the reporter's transcript.

additional marihuana packages in the trunk through the hole in the canvas (Tr. 10). He placed Justus under arrest. Justus stated that a black man in a green 1972 Pinto had hired him to tow the automobile to San Clemente, and that he had been told to follow the other man to learn his exact destination (Tr. 11).

Justus and the officer proceeded up the highway in the officer's car until Justus pointed out a 1972 Pinto driven by petitioner and identified petitioner as the man who had hired him to tow the Chevrolet. The agent stopped the Pinto and arrested petitioner. A search of petitioner's person produced the registration for the towed vehicle and a page torn from a telephone directory listing several towing services in the area (Tr. 11-13).

1. Petitioner argues that the search of his automobile and the seizure of the marihuana violated his rights under the Fourth Amendment. The court of appeals correctly held, however, that, since the "search" was conducted by Justus, the bailee of the vehicle, rather than by the officers, petitioner's Fourth Amendment rights were not implicated.

The protections of the Fourth Amendment apply only to "governmental action." "[I]t was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." *Burdeau* v. *McDowell*, 256 U.S. 465, 475. A search by a private person can be "governmental action" only if law enforcement officers participate in it. See *Lustig* v. *United States*, 338 U.S. 74. Whether in a particular case there has been sufficient governmental involvement to constitute an official search depends upon all the facts and circumstances. The decisions of the court below illustrate that factual approach. Compare

Corngold v. *United States*, 367 F. 2d 1 (C.A. 9, *en banc*), with *Gold* v. *United States*, 378 F. 2d 588 (C.A. 9).

The court of appeals correctly concluded that this was a private search by the bailee of petitioner's vehicle, and there is no reason for this Court to review that essentially factual determination. Justus acted on his own initiative in ripping the canvas separating the passenger compartment from the trunk and in handing the package of marihuana to the officers. There is no support in the record for petitioner's assertion that Justus acted "under coercion and under submission to authority" (Pet. 35). Although the officers stated that the automobile could not pass the checkpoint until the trunk could be inspected, they did not say, as petitioner claims (Pet. 35), that "the driver [Justus] would be detained until the trunk was examined."

Nor does it matter whether Justus had authority to rip the canvas in the car. That question might bear on petitioner's right to proceed against Justus in a civil action, but it sheds little light on whether the federal officers participated in the search. What this Court said in *Burdeau*, *supra*, applies here as well: "We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned" (256 U.S. at 475).

Since the search of petitioner's vehicle was not conducted by the federal officers, the Fourth Amendment's proscription against unreasonable searches is not applicable. There is thus no need to consider petitioner's principal contention—not reached by the court below—that a warrantless search of an automobile for aliens by fed-

eral officers at a fixed Border Patrol checkpoint is unlawful under *Almeida-Sanchez* v. *United States*, 413 U.S. 266.[3]

2. The search of petitioner's person incident to his arrest was lawful. The arrest was based upon probable cause, since the officer already knew that a crime had been committed and petitioner had been identified by his unwitting accomplice, who had earlier given a general description of petitioner and his automobile. Cf. *Carroll* v. *United States*, 267 U.S. 132, 162; *Brinegar* v. *United States*, 338 U.S. 160. There was insufficient time to obtain an arrest warrant, since petitioner was in an automobile moving on the highway. In these circumstances, the warrantless arrest was lawful, and the search of petitioner's person incident to that arrest was also proper. *United States* v. *Robinson*, No. 72-936, decided December 11, 1973.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[3] We note that a similar contention was made with respect to the same checkpoint as the one involved in the present case by the petitioner in *Ragusa* v. *United States*, No. 73-458, certiorari denied December 3, 1973. Our memorandum in opposition in *Ragusa*, a copy of which we are sending to counsel for petitioner, shows that *Almeida-Sanchez* does not apply to fixed checkpoints and, in any event, should not be given retroactive effect in cases such as this one where the search took place prior to this Court's decision.

We note also that the retroactivity and checkpoint issues are now pending before the court below *en banc* in *United States* v. *Bowen, et al.*, Nos. 72-1012, *et al.*, argued December 11, 1973.